

INFORMAL CUSTODY TRIALS

Webinar

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Idaho Rule of Civil Procedure 16(p) Informal custody trial.

- (1) An Informal Custody Trial is an optional alternative trial procedure that is voluntarily agreed to by the parties, counsel and the court to try child custody and child support issues. The model requires that the application of the Idaho Rules of Evidence and the normal question and answer manner of trial be waived. Once the waiver is obtained the matter proceeds to trial by consent as follows:
 - a. The moving party is allowed to speak to the court under oath as to his or her desires as to child custody and child support determination. The party is not questioned by counsel, but may be questioned by the court to develop evidence required by the Idaho Child Support Guidelines and child custody evidence required by Idaho Code § 32-717.
 - b. The court then asks counsel for that party, if any, if there are any other areas the attorney wants the court to inquire about. If there are any, the court does so.
 - c. The process is then repeated for the other party.
 - d. If there is a *Guardian ad Litem* or other expert, the expert's report is entered into evidence as the court's exhibit. If either party desires, the expert is sworn and subjected to questioning by counsel, parties or the court.
 - e. The parties may present any documents they want the court to consider. The court shall determine what weight, if any, to give each document. The court may order the record to be supplemented.
 - f. The parties are then offered the opportunity to respond briefly to the comments of the other party.
 - g. Counsel or self-represented parties are offered the opportunity to make legal argument.
 - h. At the conclusion of the case, the court will make a decision.

- (2) Consent and Waiver. The consent to and waiver to the Informal Custody Trial shall be given verbally on the record under oath or in writing on a form adopted by the Supreme Court. (Adopted effective September 29, 2008.)

Application of the rule-

I.R.C.P. 16(p) is frequently applied to

- Modifications; especially if the parties agree there is a substantial and material change in circumstances to warrant modification.
- Petitions for child custody and support when paternity is not at issue.

Litigants

- Pro-se
- Both parties represented by counsel
- One party is represented by counsel

What cases may not be appropriate?

When there are substantial issues relating to:

- mental and emotional health
- substance abuse
- domestic violence
- child abuse
- parental alienation

Introducing the informal custody trial option

- Introduce the alternative process early
- May include as part of an orientation class or during the initial hearing
 - o Allows the parties to fully consider the option and prepare

Explaining the process

- explaining the problems with the traditional model
- preserving the co-parenting relationship
- decision will be binding

Warnings

- Sufficient opportunity to consult with legal counsel?
- Careful thought and consideration?
- Prepared?

Reviewing waiver and consent

CONSENT TO INFORMAL CUSTODY TRIAL

WAIVER OF THE RULES OF EVIDENCE FOR INFORMAL CUSTODY

Website: Idaho State Judiciary
Idaho Court Rules – Forms

Inquiry (swear the parties)

- Threats or promises made to pressure you to consent to the informal custody process or to waive the rules of evidence?
- Read and understand the consent to informal custody trial and waiver of the rules of evidence?
- Inquire regarding formal education level or ability to speak and read English.

Findings

- Waiver and consent: knowingly, intelligently and voluntarily entered
- (with advice of legal counsel)
- Counsel stipulates the Informal Custody Trial is appropriate for this case and their clients

Practice pointers

- Inform the parties they may request a recess (usually to confer with counsel)
- Parties are allowed to testify from counsel table

- No cross examination or questioning
- Allow rebuttal/response
- The parties talk themselves out - critical

The best interest factors and other legal standards.

Informing the parties of legal standards early in the process

- Assists the parties in preparation
- May assist in presentation of evidence that is relevant
- Assists the parties in understanding the court's role and the context of decisions
- Perception of fairness may be enhanced

I.C. § 32-717(1) Custody of children- Best interest.

Minimum factors the court must consider when making decisions regarding the custody, care and education of children.

- (a) The wishes of the child's parent or parents as to his or her custody;
- (b) The wishes of the child as to his or her custodian;
- (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
- (d) The child's adjustment to his or her home, school, and community;
- (e) The character and circumstances of all individuals involved;
- (f) The need to promote continuity and stability in the life of the child; and
- (g) Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child.

The evidence

- Court determines weight and sufficiency
- Credibility
 - o "She denied me my visitation." The rest of the story... "He was intoxicated when he arrived."
- Documents without "foundation"
 - o School records, I.E.P.'s, psychological reports, *Guardian Ad Litem* reports, etc.
- Easier to filter raw data, than have incomplete data

Benefits to children

- Preservation of co-parenting relationship
- Decrease of conflict between parents
- The wishes of the children are more easily introduced and are more often heard

- Courts frequently receive more child focused evidence, rather than focus on “poor character” evidence

Benefits to parents

- Costs of litigation are reduced
- Generally the trial is set at an earlier date
- Frequently same day decisions
- Opportunity to be fully heard
 - o allowing the parties to “talk themselves out”
 - o reframing and refocusing
 - o use of paraphrasing

Justice

- Efficient and effective
- Creation of a record
- Ability of the Court to focus parties on relevant information
- Evidence is cohesive
- Reduces frustration associated with traditional witness inquiry
- A feeling of being fully heard
- Process assists in increasing understanding and depth of knowledge in a particular case
- Compliance with court orders

Questions by the court

- Asking open ended questions
 - o “What do you want for a parenting plan?”
 - o “Why do you want it?”
 - o “Why is it fair?”
 - o “How does it protect the best interests of the child(ren)?
 - o “How does it assure the other parent of a substantial and meaningful opportunity to parent?”

Active listening

- Use of paraphrasing

Getting comfortable with informality in the courtroom

- It takes time!
- Where to start?

Concerns

- Weight of evidence
- Fair and reliable evidence
- Getting a feel for evidence without filters
- How much should we be involved? Staying neutral
- Redirecting the parties when evidence is cumulative or irrelevant
- Giving proper perspective to any negative feedback
- Decisions; when to take under advisement